

Case Review

# Photography, patient consent and scientific publications: medicolegal aspects in France

Nicolas Franchitto <sup>a,\*</sup>, Laurent Gavarri <sup>b</sup>, Fabrice Dédouit <sup>a</sup>,  
Norbert Telmon <sup>a</sup>, Daniel Rougé <sup>a</sup>

<sup>a</sup> *University Hospital of Rangueil, Department of Legal Medicine, Avenue Jean Poulhes, 31059 Toulouse, France*

<sup>b</sup> *Faculty of Law, Boulevard Alphonse Daudet, 83000 Toulon, France*

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## Abstract

To take a photograph of a person is to lay bare their identity to the eyes of others. The photograph generates an ambiguous relationship with the idea of identity. It can in turn lay it bare, exploit it, reveal and embody it. It creates an image which takes on its own existence separately from the person portrayed. It can become a source of profit, a cause of moral harm, a means of proof, and an object of cupidity. The question which arises is: how can we know when it is legitimate to use a photograph? The law protects the person's legitimate interest, but does not only protect private interests, it also watches over the common good, and the interest of society as a whole justifies a certain number of uses of a person's photograph without their consent. This article has been written in order to clarify the ethical and legal conflicts from a French perspective, which the physician has to confront when obtaining consent from a patient before taking a photograph. Awareness of these points should make it possible to avoid any problems which could arise in relation to publications which carry illustrations for the purpose of increasing their impact.

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## 1. Introduction

The concept of a person's identity defines not only what establishes that person in society, that is, their physical identity, but also the unchanging attributes which are the foundation of their deepest nature and moral identity. In fact, the physical person forms a whole. Physical and moral identities are difficult to separate. To take a photograph of a person is to lay bare their identity to the eyes of others. The photograph generates an ambiguous relationship with the idea of identity. It can in turn lay it bare, exploit it, reveal and embody it. It creates an image which takes on its own existence separately from the person portrayed. It can become a source of profit, a cause of moral harm, a

means of proof, and an object of cupidity. This is why it is protected by strict legal provisions. The question which arises is: how can we know when it is legitimate to use a photograph? As the person's physical appearance and its photographic reproduction are identical, the relation between the two is such that it cannot be ignored by the law. The American Indians believed that the photographer could steal their soul, which shows the strength of this relation. This is why the law protects the person's legitimate interest. But the law does not only protect private interests, it also watches over the common good, and the interest of society as a whole justifies a certain number of uses of a person's photograph without their consent.

## 2. Press publication of patient photographs

A photograph reveals a person's identity and may be published without their consent in the name of freedom

\* Corresponding author. Tel.: +33 5 61 32 27 99; fax: +33 5 61 32 21 77.  
E-mail address: [franchitto@club-internet.fr](mailto:franchitto@club-internet.fr) (N. Franchitto).

of information. This is “an essential freedom” which “supposes that the public should be informed of any matters which are of interest for the life of the community”.<sup>1</sup> It has long been accepted that illustrations make a useful contribution to the information of the public. An illustration is not necessarily information in itself, but it usefully complements comment on news, and may even take the place of comment. The rights of private persons over their photograph thus come into conflict with the public’s right to be informed. This situation has arisen in the medical press or the mass audience press during natural disasters with an influx of victims and deployment of medical support on a large scale. Doctors and journalists are on the spot and photographs are taken. In this case, the persons who are photographed may be patients, who cannot oppose publication on the grounds of absence of consent and respect of their right to the image. Photography is in fact a necessary part of information on current events, as without it rapid and authentic portrayal of events would be impossible. The French Supreme Court of Appeal has ruled that “freedom of information authorises the publication of photographs of persons involved in an event, provided that the dignity of the human person is respected”.<sup>2</sup> It must be stressed that what authorises the publication of a photograph is the person’s involvement in an event. A relationship of participation is the only requirement. Anyone’s photograph can therefore be used, with the prerequisite that a historic or current event must be the main subject of the photograph. This jurisprudence seems clear where the media are concerned, but can it be applied to doctors?

### 3. Doctors must respect confidentiality and the right to the image

Scientific journals encourage the illustration of publications with photographs of patients,<sup>3</sup> as these stimulate the reader by making the presentation of the article more attractive. Photographs have an instructive role in continuing medical education, and by communicating information visually, they also make the subject matter of the article easier to understand.<sup>4</sup> Periodicals which are accessible in an electronic version are increasingly consulted, which has facilitated the exchange of medical information and in consequence has led to increased demand for medical illustrations.<sup>5</sup> Patient consent to the publication of photographs showing them, whether the persons are identifiable or not, is a moral and legal obligation in both the United Kingdom<sup>3</sup> and France. Scientific journals have published guidelines on the subject.<sup>6,7</sup> There are several ways of protecting patient anonymity, such as covering the eyes with a black band, but this is inadequate and has been abandoned.<sup>8,10</sup> In addition, tattoos, scars and jewellery may be visible<sup>5</sup> and make identification possible. Obtaining patient consent guarantees respect of their privacy and autonomy,<sup>8,9</sup> principles which are the cornerstone of the relation of trust between the patient and their physician. Respect of medical confidentiality is accepted dogma

and patients are the sole “owner of the data” concerning them. This is one of the justifications for the drawing up of legal provisions which prohibit third parties from reproducing and making use of a person’s likeness. The right to the image protects an individual’s legitimate interest and since the mid-nineteenth century use of the image of another is liable to sanction.<sup>11</sup> Lack of respect of the right to the image is a fault of the doctor if he or she has not obtained the patient’s consent to its publication, and he or she is exposed to liability. Patients have an exclusive right to prohibit use of their image on the basis of the tenets of propriety and discretion, which are essential elements of privacy and private life.<sup>12</sup> French justice has already ruled on this subject, as in a judgment of the Conseil d’Etat of 28 May 1999<sup>13</sup> concerning a doctor of sexology who had photographed a patient during a hypnosis session. The Conseil d’Etat found the doctor guilty of breach of confidentiality and breach of professional honour.

The doctor must obtain the patient’s consent, but consent is not irrevocable and the patient can withdraw it at any time. We believe that because of the risk that doctors may be exposed to liability, it is important to have an interview with the patients during which they can be informed as to the use to which the photograph may be put. It is advisable to allow patients time to reflect, followed by a second interview where the quality of the information can be improved if the patient is still undecided. Provision of information is a requisite for consent and it must be in conformity with the Code of Medical Ethics and the Law of 4 March 2002<sup>14</sup> relative to patient rights and the quality of the health system. The doctor may obtain the patient’s signature on a standardised form which states how the photograph may be used. Even if this document does not give the doctor a “legal discharge”, it is written proof of the steps taken by the doctor to obtain the patient’s consent.

### 4. Conclusion

Patient photographs, used for the purposes of teaching or scientific publication, are subject to ethical and legal principles of consent and respect of confidentiality, and this is a universal attitude. A doctor who uses a patient’s photograph without consent, or at least without being able to demonstrate that he or she took steps to obtain consent, may be exposed to liability, as may the editor of the journal which publishes it. However, legal provisions may differ from one country to another, and not only authors but also the editors of scientific journals must be aware of this in order to avoid any obstacles to publication.

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